MISCELLANY.

Trial by Publication.—The exploitation of the McNamara case, before legal trial, in the press of all sorts, calls attention to the dangers involved to justice in such methods. The American people have got into a bad way of condoning such things. Public opinion must learn to repudiate it. The referendum applied to a criminal trial will lead up to the worst mockeries of justice which Athens or Paris ever exhibited for our scorn. When Pilate hesitated he took Christ out on the Temple steps and asked the mob: "Shall I crucify him?" And the mob shouted back: "Crucify him!" That is what it will come to at this pace. The spectacle of the chief detective himself trying the case in a popular magazine last summer was the most extreme instance of misguided zeal. But it merely typified the national habit that is forming.

We indorse the sentiments of the following editorial from the Chicago Record-Herald:

"One lesson of the McNamara cases for the press and people of the United States is that trial by publication in advance of legal trials operates against the obtaining of justice. The Record-Herald can speak frankly on this subject, for it studiously avoids trying to convict or to acquit anyone accused of crime.

"In many published interviews and articles the McNamaras were virtually declared guilty or innocent long before the selection of jurors at Los Angeles began. Detective Burns convicted them in a magazine; intemperate defenders of unionism pronounced their arrest and trial the result of a conspiracy to crush the unions and asserted that they would be innocent in the eyes of labor even though convicted in court.

"If we are to have civilization we must try cases in the courts, not in public print. Why did the selection of jurors at Los Angeles drag along insufferably to anyone desirous that the law should act promptly as well as justly? Largely because public opinion had been prejudiced for or against the accused men. Freedom of the press in all essential respects must be upheld, but it must not become perverted to excuse such arguments as were made to the public before and during the legal trial of the McNamaras. In England such practices are forbidden. Discussion of a case pending in court is punished at once as contempt.—John H. Wigmore, in Journal of the American Institute of Criminal Law and Criminology (January, 1912).

The Law of England as to Boxing.—The controversy as to the legality of the Wells-Johnson boxing contest has come to a sudden end without a definite decision on the point of law. This result has been reached by the action of the freeholders of the Earl's Court

Exhibition, who applied for, and obtained, an injunction against the holding of the contest there on the ground that it was of a character which would endanger the licenses issued by the County Council and the justices, which the lessees, by their contract, were bound to do everything to preserve. This in effect is a ruling that the hostility of the licensing authorities to the contest was likely to be evinced by withdrawal of the licences irrespective of the question whether the contest would in its nature be a breach of the public peace. The promoters of the contest and the would-be combatants accordingly attended before the magistrate and gave undertakings not to hold the contest in the United Kingdom. This undertaking, however, cannot be considered as a distinct admission of the illegality of a boxing contest under the conditions adopted.

In view of the interest taken in the legal aspects of the prohibited fight, we reproduce, as the best summary of the law on the subject, the following article by Mr. Edward Manson on the law as to boxing, which appeared in the *Law Quarterly Review* of January, 1890 (Vol. VI., No. 20), and which is referred to with approval by Sir Frederick Pollock in his work on "Torts:"

The revival of public interest in boxing naturally suggests the question, What is the attitude of the law towards these heroic contests? It is one of the "fundamentals" of English law that a man's person is sacred, inviolable. "No one," says Coleridge, J., in Reg. *v.* Lewis (1 C. & K. 419), "is justified in striking another unless it be in self-defence," and even the right of self-defence does not justify counterblows struck with the desire to fight (Reg. *v.* Knock, 14 Cox C. C. 1). At the same time the law favours manly sports and exercises because these make men better citizens. Sir Michael Foster (Crown Law 259), combating an opinion of Sir Matthew Hale that death from a blow at cudgels or a fall in wrestling is not excusable homicide, says, "If A intendeth to beat B in anger or from preconceived malice and death ensueth it will doubtless be no excuse that he did not intend all the mischief that followed. * * * But is this the case of persons who in perfect friendship engage by mutual consent in any of those recreations for a trial of skill and manhood in the use of their weapons?" (if Friar Tuck, for instance, and King Richard agree to an exchange of buffets). "Here is indeed the appearance of a combat, but it is in reality no more than a friendly exertion of strength and dexterity for the purposes I have mentioned. And which taketh the case out of the general rule laid down by the learned judge and entirely distinguisheth it from that, Bodily harm was not the motive on either side. I therefore cannot call these exercises unlawful. They are manly diversions, they tend to give strength, skill, and activity, and may fit people for defence, public as well as personal, in time of need. I would not be understood to speak here of prize fighting and boxing matches, or any other exertions of courage, strength, and activity of the like kind

which are exhibited for lucre and can serve no valuable purpose, but on the contrarv encourage a spirit of idleness and debauchery, for these disorders will, I conceive, fall under a quite different consideration." The distinction here drawn by Foster between a friendly sparring match as a manly exercise or recreation, and a prize fight fought with or without gloves is well recognized in our law.

In Reg. *v.* Orton (39 L. T. R. 293) the Chairman, Sir F. Fowke, directed the jury that if the encounter was a mere exhibition of skill in sparring, a sparring match fought in gloves, it was no offence at law; but that if the parties met intending to fight till one gave in from exhaustion it was a breach of the law and a prize fight, whether the combatants fought in gloves or not, and he left the question to the jury, "Was this a sparring match or a prize fight?" The jury, having the gloves before them, found it was a prize fight, and the conviction was sustained on appeal. The recent so-called "glove fight" at the Pelican Club was unquestionably a mere prize fight disguised. On the other hand, where the medical evidence was that the sparring with gloves was not dangerous, the gloves being too soft to give a black eye, and it took place in a private room and there was no breach of the peace, Bramwell B. refused to treat death ensuing as manslaughter. The nature of the encounter is therefore a question of fact. If a boxing match either is in its origin a fight, however disguised, or if it becomes so as the combatants warm, it is a breach of the peace and unlawful. "Nothing can be clearer," says Hawkins J. in Reg. *v.* Coney (8 Q. B. Div. 53), "than that every fight in which the object and intent of the combatants is to subdue the other by violent blows is or has a direct tendency to a breach of the peace," for "although," he adds, "a prize fight may not be commenced in anger it is unquestionably calculated to raise the angry feelings of both before its conclusion." It is not at all necessary, however, to render a fight with fists illegal, that there should be any anger or mutual ill-will (Commonwealth *v.* Colberg, 119 Mass. 350). "Whenever two persons go out to strike each other and do so each is guilty of an assault" (per Coleridge J., Reg. *v.* Lewis, 1 C. & K. 419). This being so no agreement to fight can render the contest lawful (Parker C. B., Boulter *v.* Clark, Buller N. P. 16). "An individual cannot," as Coleridge C. J. said in Reg. *v.* Coney (8 Q. B. Div. 567), "destroy the right of the Crown to protect the public and keep the peace" (and see Rex *v.* Billingham, 2 C. & P. 234). There is another reason besides the protecting of the public against disorderly exhibitions. It is against the public interest, as Stephen J. has pointed out, that the lives and health of the combatants (as valuable to the State) should be endangered by blows (see also Cooley T., ed. 1879, 163). This is the reason why no consent can make so dangerous a diversion as fighting with naked swords lawful (Hawk. P. C., 1, 481), and "the fists of trained pugilists are dangerous weapons of this

kind which they are not at liberty to use against each other" (per Mathew J., Reg. *v.* Coney, 8 Q. B. Div. 547). On this ground Entellus' and Dares' sparring match at the games would certainly by English law have been unlawful, having regard to the "gloves" used on the occasion. The tests, therefore, of legality in a boxing match are (i) is it a breach of the peace or does it tend to it; (ii) does it endanger life or health. If it does either of these it is unlawful and no consent can make it otherwise.

A mere looker-on at a prize fight is not ipso facto guilty of an assault, but his presence, if unexplained, may be evidence of encouragement, so as to render him guilty of aiding and abetting (Reg. *v.* Coney, 8 Q. B. Div. 534).

The maxim "volenti non fit injuria" has lately come in for a good deal of criticism. Speaking generally, however, if there is consent there can be no assault (Christopherson *v.* Bare, 11 Q. B. 473, 477), but what is the precise nature of the consent, the leave and license given in friendly trial of strength and skill, and what will such consent cover? "In cases where life and limb are exposed to no serious danger in the common course of things, I think," says Stephen J. (Reg. *v.* Coney, 8 Q. B. Div. 549), "that consent is a defence to a charge of assault even when considerable force is used, as for instance in cases of wrestling, single stick, sparring with gloves, football, and the like, but in all cases the question whether consent does or does not take from the application of force to another its illegal character is a question of degree depending on circumstances." The reasonable view is that the combatants consent to take the ordinary risks of the sport in which they engage (Fitzgerald *v.* Cavin, 110 Mass. 154), the risks of being struck, kicked, or cuffed, as the case may be, and the pain resulting therefrom; but only while the play is fair, and according to rules, and the blows are given in sport and not maliciously (Cooley T., ed. 1879, 163). A blow below the belt in boxing would undoubtedly be an assault, so would a vicious attempt, sometimes made, to strangle an adversary on the ropes of the ring, so if one made a blow at the other likely to hurt before he was on his guard, and without warning (East P. C., c. 5, s. 41). If these tacit conditions of fair play and good temper are not kept the consent is at an end, and the parties are remitted to their rights. Nor will consent absolve from the consequences of culpable carelessness, as in Sir John Chichester's case (Alleyn 12), where in play "Sir John passed at his servant with his sword in his scabbard, he parried with a bed staff and in the heat of the exercise the chape of the scabbard flew off, and the servant was killed by the point of the sword." This would be paralleled if a boxer should negligently put on, say, a knuckleduster instead of a glove. Of course, consent may go farther, as it does in the case of prize fighters, and anciently of gladiators, and be a

consent to total disablement or death, but such consent is nugatory. "If a man license another to beat him, such license is void as against the peace" (Buller N. P. 16), a fortiori a license by a man for taking his own life is void, not to say criminal. By American law the consent, however, though void, may be given in evidence in mitigation of damages.

Here in its treatment of boxing, as elsewhere, it is impossible not to admire the wisdom of our Common Law. The Englishman is by nature combative, but he is also law-abiding. The Common Law which is the reflection of the national temper reconciles these two antagonistic instincts in the only way in which they can be reconciled, in a way which is consonant both to reason and our moral sense. In a word, boxing in sport is, as old Roger Ascham would say, an "honest pastime," and may share in Sir Michael Foster's eulogium. The prize ring is on a moral level with the cockpit. Chrysippus the Stoic thought that cock fighting was the final cause of cocks to inspire us by the example of their courage. Perhaps prize fighters may serve some similar purpose in the moral economy of things.—London Law Journal.

IN VACATION.

Here Below.—Edward Douglas White, of Louisiana, Chief Justice of the United States Supreme Court, said at a luncheon given in his honor in Washington, that corporate and political corruption will only be stopped when convictions mean ignominy and disgrace.

"At present," said Judge White, "I am afraid that convictions and fines are regarded too lightly by the big financiers of the sinning type. They remind me of John Booth, of Lafourche.

"John Booth, an old offender, was haled before a magistrate, who said to him sternly:

"'I see by your record, Mr. Booth, that you have had thirty-seven previous convictions. What have you to say?'

"Booth, assuming a sanctimonious air, replied:

"'Well, judge, man is not perfect.'"—Minneapolis Journal.

He Had No Choice.—"You say you were in a saloon at the time the alleged assault took place?" a lawyer inquired of a witness at the central station the other day.

"Yes, sir, I was," the witness admitted.

"H'm," the lawyer pursued, "that is interesting. And did you take cognizance of the barkeeper at the time?"

"I don't know what he called it, sir," came the reply, with perfect ease, "but I took what the rest did."—Philadelphia Times.